

Minutes for Meeting #8 Government Industry Advisory Panel (27 Oct 16)

Section 813, FY16 NDAA, Rights in Technical Data

ATTENDEES:

- **Panel Members:** Richard Ginman (Chair), Richard Gray, Charles Harris, Kelly Kyes, James McEwen, Roger Hamerlinck, Sean O'Brien, Dora Hancock, Thomas Dee, Elliott Branch, Carl Rapp, Alison Brown
- **Support Staff:** LTC Andrew Lunoff (DFO), Mike Canales
- **Public:** Karen Wilson, Royce Kneece, Richard Van Atta, Jon Etherton, Jeffrey Divney
- **Public (On Telecon):** George Winborne, James Haag, Jane Barrow, Bill Decker, Rob Williams, Kevin O'Brien, Christine Gilsdorf, John Popescu
- **Media:** Sandra Erwin,

INTRODUCTIONS

- Introduced everyone – including those on the telephone

PRESENTATIONS:

All presentations will be added to the FACA database site under the appropriate committee meeting location when GSA audit is complete:

<http://www.facadatabase.gov/committee/meetings.aspx?cid=2561>

1. Jon Etherton, NDIA and Etherton and Associates, Compendium on Statues

- Section 953, FY87 NDAA Comments: Applies to the development of new items when dealing with contractor to contractor. Rub concerns modifications and not necessarily new development. Specifically says new items in development. Someone writing in 1986 and their understanding. Source of funding was the bedrock.
- FY87 NDAA 10 USC 2320: required that the terms “developed” and “private expense” be defined in regulation
- FY87 NDAA 2321: Panel Question--Was there a reason? DoD reaching back for things challenging everything. Trying to figure out how to address challenges in a rational way.
- FY88 and FY89 NDAA: Major changes that caused some issues.
 - New requirements for terms “exclusively with Federal Funds” and “exclusively at private expense” defined in regulation.
 - Required that IR&D/B&P be considered as private expense funding.
- Section 8106 amended 10 USC 2321: established presumption that a commercial item was developed exclusively at private expense for purposes of validating a contractor assertion of restriction on the DoD disclosure or release of data delivered under a contract.

- Panel Question--Why in 2321 and not 2320? Only to validate assertions.
- 10 USC 2320 Sub paragraph E: PM conduct an early, long-term assessment of technical data needs and to establish corresponding acquisition strategies that provide for tech data rights needed to sustain such systems and subsystems over their life cycle
- Section 821 amended 10 USC 2320: Authorized covered govt support contracts access to and use of technical data under a contract for the sole purpose of furnishing advice or technical assistance directly to the government
- FY11 NDAA Section 824: amended 2320 for IR&D. For purposes of establishing rights in data, deemed IR&D to be Federal Funds in cases where a contractor used no other private expense funds in the development of an item or process
 - 10 USC 2321; removed time limit on the ability of DoD to challenge a contractor assertion of a restriction on the use or release of data delivered under a contract in cases where the DoD finds that reasonable grounds exist to believe that contractor has made an erroneous assertion
- FY12 NDAA Section 815: Panel Question--Any discussion of insertion of subsection A-E in Title 10 USC 2320 on codification of GPR? Direction that was different that the Senate had taken. No discussion in conference. Merely references GPR but doesn't say why. Was not anticipated to be controversial. Would this discourage contracting officers to negotiate with mixed funding?
 - Goes back to the discussion of additional rights category, however, specially negotiated licensing rights have a floor of limited and unlimited ceiling. Normally, they fall somewhere between limited and GPR rights. Not sure with this if we need additional category of rights
 - 2320 fourth bullet refers to deferred ordering
 - Panel Question--Any thoughts on why didn't tweak IR&D provision?
 - Hill thought it might be too hard. After talking with folks in industry, that at some point in the future IR&D would be federal funding.
 - Companies would do the development, but would have all rights up front.
- Panel Question--Where does GPR five years to unlimited come from? Regulatory requirement. Idea of commercial refresh for software every five years. What is the basis? GPR didn't show up in the statute until 2011/2012

2. Software, Software License Rights, and the Army Software Sustainment Perspective, Azza Jayaprakash, IP Division Chief, AMC Legal Center:

- Time effectiveness is critical due to lack of funding and growth in number of programs supported
- Factors that Influence the Mode of Sustainment
 - Statutory
 - Mission Readiness (Time Effectiveness)
 - Which mode of sustainment will better meet mission deadlines? Which mode may compromise mission readiness?

- Cost Effectiveness Mode of Sustainment
- All software maintenance is considered depot level maintenance. Software Engineering Center (SEC) is considered a depot from that perspective under 2460 statute
- Panel Questions--How much statutory or regulatory issue? Or how much is we fail to negotiate up front to do what we want?
 - Some truth to not getting information up front
 - Paradigm shift is occurring. PEO customers working more closely with SEC to consider source code and license rights. Contractors will bid and cross out CDRLs.
 - When negotiating greater than “restricted rights”, for commercial and non-commercial this is where we are all having issues in competitive mode. Industry does not want to deliver any source code and not enthusiastic about providing greater/broader license rights. When there are sufficient funds on contract, majority of offerors coming back saying they do not want to deliver.
- Panel Questions-- What are more specific definition of requirements for source code going to be used for? You can perform vulnerability checks. What deliverables they need and why they need deliverables instead of just asking for all source code with GPR. Up front in the RFP begin talking about the software sustainment plan.
 - Challenges associated to having the right folks negotiating the contract.
- Panel Question--How software would be broken down in USC 2320? Statute would have to differentiate between software and hardware. All arguments are talking about software
- Panel Question--What would be the differences in 2320 between in hardware and software? Rights in technical data and computer data. Form, fit, function and what is OMIT data. You would have to have a separate section talking about software. Detailed manufacturing and process data is similar to source code.
- Panel Question--Do I have to have it in statute or can I do it in policy? In DFARS, what can you get away with? Subject to a DFARS waiver? Can't waive statute. If the statute is flexible, don't need to waive.
 - Contracting officer has authority to waive any portion of the FAR and DFARS that is not executive order of the President, statute, or policy of another agency less those sections retained by DPAP.
 - Panel comment—the government has authority to write policy on anything it wants to write policy. Don't need authority in statute if it is silent.
 - If including computer software in 2320, you would need to exclude the object code. 227 rewrite in 2010 proposed this solution.
- Restricted rights haven't kept up with technology (reference slide sixteen of presentation)
 - No issues with exploring restricted rights. How many copies do you need from a sustainment perspective?
 - Panel Question--If greater than one, how do you comply with that? Maybe constraint shouldn't be on the number of copies but the environment that it is being used in.
 - Looking at purposes for use and will help to take away compliance risk. Anything for sustainment is too broad.

- Recommendation for Commercial Software Licensing: Various government organizations to have dialogue with commercial vendors on what they are willing to agree on and the effects of mandatory flow downs. Difficult for a prime to implement commercial software flow down.
- Panel Question--Do we have a Data Item Description that we could use to ask for those specific items? Software transition plan but does not get into the details needed to get at tools.

3. Updated Overview of Tension Points, Richard Gray:

- Panel Question--Differentiation from interface data and form, fit, function data? Program offices leaning forward and using the black box mentality. Solve the problem of separating form, fit, function data or call it interface data to allow for gray area of unlimited rights and limited rights. Legitimate argument that needed to protect proprietary data. Interface will have to be defined better than interface data.
- Need to have IP person within program trained and designated (possible solution)
- Small Business Policy answer on first right of refusal for services
- Ask DCAA about indirect cost pools considered privately funded (All indirect may have a problem other than IR&D). Panel Chair to engage.

Public Comment

George Winborne, AMC: DFARS language does not mention IRAD language.

- Language in ATK case, even if something is directed by two contracts, may not be independent development it is going to be concerned indirect costs.
- Statute only speaks to IRAD/B&P, but the statute does not prescribe the solution for indirect cost pools.
- Question is can I have direct cost pools? What other legitimate R&D costs are directed?

Bill Decker, DAU: DAU is planning to refer to software support as software sustainment to avoid confusion between hardware and software. Make sure it squares with 10 USC 2460.

Panel Admin and Planning

- November 10th meeting: 2321 rewrite from AF attorneys, IRAD bullets from Mr. Harris (send both out)

APPROVED: PANEL CHAIR, MR. RICHARD T. GINMAN _____